

IN THE SUPREME COURT OF MISSOURI

CITY OF WASHINGTON, MISSOURI,)	
)	
Appellant,)	
)	
v.)	Supreme Court No. SC84791
)	
DANIEL BARNHART,)	
)	
Respondent.)	

Appeal from the Circuit Court of Franklin County
Twentieth Judicial Circuit
Division 6
Honorable Joseph M. Ladd

APPELLANT’S SUBSTITUTE BRIEF

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JURISDICTIONAL STATEMENT

Appellant the City of Washington, Missouri, is a duly incorporated city of the third class of the State of Missouri (the “City”). Respondent Daniel Barnhart is a real estate salesperson licensed in the State of Missouri. On September 28, 2001 the trial court entered its Judgment of Dismissal. The judgment was designated as a final appealable order under Rule 74.01 (a).

City’s Notice of Appeal was timely filed in the Court of Appeals, Eastern District of Missouri, on October 9, 2001. On July 16, 2002 the Court of Appeals issued its opinion affirming the Judgment of Dismissal of the trial court. City’s Application for Transfer and Motion for Rehearing were timely presented to the Court of Appeals on July 31, 2002 and were subsequently denied on August 29, 2002. Subsequently, City timely filed its Application for Transfer in this Court which was granted on October 22, 2002. Jurisdiction is therefore proper in this Court. Mo. Const. Art. V, Sec. 10, Rule 83.04 and 83.05.

STATEMENT OF FACTS

Appellant City of Washington, Missouri (the “City”) is a Missouri municipal corporation and a city of the third class located in Franklin County, Missouri. (Information and Complaint, Legal File (L.F. 10)). Respondent Daniel Barnhart (“Barnhart”) is a licensed real estate salesperson, licensed pursuant to Section 339.010 (2) R.S.Mo. 2000. (Defendant’s Motion to Dismiss, L.F. 12). Barnhart operates out of an office located at 1380 High Street, Washington, Missouri. (Defendant’s Memorandum of Law in Support of Defendant’s Motion to Dismiss, L.F. 16).

City, acting by and through the City Attorney, filed an Information and Complaint charging Barnhart with a violation of Section 605.010 of the Code of the City of Washington, Missouri (the “Code”) for “Business License Violation – Conduct a Business, Trade or Location, Calling or Occupation in Whole or in Part for Which a License or Permit is Required Without Having First Procured the Same.” (Information, L.F. 10). Barnhart filed his Motion to Dismiss alleging that as a real estate salesperson he could not maintain an office in the City for the conduct of his business, an essential requirement in order for the City to be able to require Barnhart to have a business license. (Defendant’s Motion to Dismiss, L.F. 12-13).

Arguments were heard on Defendant’s Motion to Dismiss and the trial court entered its Judgment of Dismissal for the reason that, “as a matter of law the City cannot require Defendant to have a business license or impose a license tax upon him, because Defendant does not and cannot maintain a business office within the

City” citing Section 71.620 R.S.Mo. 2000, 4 CSR 250-4.050 (2) and 4 C.S.R. 250-8.010 (1). (Judgment of Dismissal, L.F. 101).

POINT RELIED ON

THE TRIAL COURT ERRED IN DETERMINING THAT, AS A MATTER OF LAW, THE CITY CANNOT REQUIRE BARNHART, AS A REAL ESTATE SALESPERSON, TO HAVE A BUSINESS LICENSE OR IMPOSE A LICENSE TAX UPON HIM BECAUSE SECTION 94.110 RSMO. (2000) AND SECTION 71.620 RSMO. (2000) AUTHORIZE THE CITY TO LICENSE REAL ESTATE SALESPERSONS AND IMPOSE A LICENSE TAX UPON THEM.

Anderson v. City of Olivette, 518 S.W.2d 34 (Mo. 1975)

Murray v. Missouri Highway and Transp. Com'n, 37 S.W.3d 228 (Mo. 2001)

St. Paul Fire & Marine Ins. Co. v. Wedgewood Realty, Co., 639 S.W.2d 233 (Mo.App.E.D. 1982)

Eads v. Kinstler Agency, Inc., 929 S.W.2d 289 (Mo.App.W.D. 1996)

Section 71.620 RSMo. (2000)

Section 91.110 RSMo. (2000)

Section 91.270 RSMo. (2000)

Section 91.360 RSMo. (2000)

Section 339.010 RSMo. (2000)

4 CSR 250-8.010(1)

4 CSR 250-4.050(2)

Black's Law Dictionary 4th Edition

ARGUMENT

THE TRIAL COURT ERRED IN DETERMINING THAT, AS A MATTER OF LAW, THE CITY CANNOT REQUIRE BARNHART, AS A REAL ESTATE SALESPERSON, TO HAVE A BUSINESS LICENSE OR IMPOSE A LICENSE TAX UPON HIM BECAUSE SECTION 94.110 RSMO. (2000) AND SECTION 71.620 RSMO. (2000) AUTHORIZE THE CITY TO LICENSE REAL ESTATE SALESPERSONS AND IMPOSE A LICENSE TAX UPON THEM.

On appeal this Court, in reviewing the dismissal of a cause of action, examines the pleadings, allowing the broadest intendment, treating all alleged facts as true, and construing the allegations in favor of the pleader, to determine whether they invoke principles of substantive law. City of Chesterfield v. DeSchelter Homes, 938 S.W.2d 671 (Mo.App.E.D. 1997). This Court will affirm the order of dismissal if any ground supports the motion, regardless of whether the trial court relied on that ground. W.D. v. M.G.R., 905 S.W.2d 134, 136 (Mo.App.E.D. 1995). No deference is given to the trial court when the court has erroneously declared or applied the law. Taylor v. City of Pagedale, 746 S.W.2d 576, 578 (Mo.App.E.D. 1987).

The trial court's entry of the Judgment of Dismissal of the Information and Complaint finding that as a matter of law the City could not require Barnhart, a real estate salesperson doing business and operating out of an office within the City, to have a business license or impose a license tax upon him because Barnhart

“as a matter of law” did not and could not maintain a business office is erroneous and misinterprets Sections 71.620 R.S.Mo. 2000 and 94.110 R.S.Mo. 2000, contradicts the plain and ordinary meaning of Sections 71.620, 94.110, 94.270 and 94.360 RSMo. 2000, and contradicts and conflicts with this Court’s decision in Anderson v. City of Olivette, 518 S.W.2d 34 (Mo. 1975). (All statutory references herein are to R.S.Mo. 2000 unless indicated otherwise).

The primary rule of statutory interpretation requires the court to ascertain the legislative intent by considering the plain and ordinary meaning of the words in the statute. Murray v. Missouri Highway and Transp. Com’n, 37 S.W.3d 228 (Mo. 2001). Each word, clause, sentence, and section of a statute should be given meaning. Hoffman v. Van Pak Corp., 16 S.W.3d 684, 689 (Mo.App. E.D.2000). Statutes are construed together and harmonized if possible. Auto Alarm Supply Corp. v. Lou Fusz Motor Co., 986 S.W.2d 467, 469 (Mo.App. E.D.1998).

As a city of the third class, the City is authorized, pursuant to the provisions of Section 94.110, to “levy and collect a license tax on ... brokers, real estate agents and all other vocations whatsoever.” This express grant of authority was affirmed in *Anderson*, wherein this Court ruled that third class cities, like the City, are authorized to license real estate agents. “Section 94.110 ... confers upon cities of the third class three areas of authority with respect to businesses and occupations in such cities. The first power granted is ‘to levy and collect a license tax’ upon some 79 businesses and callings, including ‘real estate agents’.” *Anderson*, at 37.

No definition was given in *Anderson* or in Section 94.110 for the term “real estate agent”. “Absent statutory definition, words used in statutes are given their plain and ordinary meaning with help, as needed, from the dictionary.” American Healthcare Management v. Director of Revenue, 984 S.W.2d 496 (Mo. 1999).

Black’s Law Dictionary defines real estate agent as “any person whose business it is to sell, or offer for sale, real estate for others...” This definition, adopted in St. Paul Fire & Marine Ins. Co. v. Wedgewood Realty, Co., 639 S.W.2d 233 (Mo.App.E.D. 1982), is inclusive of both real estate salespersons and real estate brokers, as those terms are defined in Section 339.010. See also Franta v. Hodge, 302 S.W.2d 291 (Mo.App. 1957) (A real estate broker or salesman is one who sells the realty of others and not his own realty).

Further, the terms “real estate agent” and “real estate salesperson” are synonyms for one another and have been used interchangeably by Missouri courts. See Eads v. Kinstler Agency, Inc., 929 S.W.2d 289 (Mo.App.W.D. 1996) (“One was a broker, and one was a licensed agent, or ‘salesperson’”) and Cook v. Coldwell Banker/Frank Laiben Realty, 967 S.W.2d 654 (Mo.App.E.D. 1998) (“Plaintiff...a licensed real estate agent, worked as a salesperson or agent...”). Barnhart has admitted that he is a real estate salesperson. (Defendant’s Motion to Dismiss, L.F. 12). Therefore, real estate salespersons, like Barnhart, are real estate agents within the meaning of Section 94.110 and are within the City’s licensing authority granted by that statute.

The City's authority under Section 94.110 is limited only by Section 71.620. This section states, in relevant part, that "no person following for a livelihood the profession of...real estate broker or salesman in this state, shall be taxed or made liable to pay any municipal...tax or license fee for the privilege of following or carrying on his profession by a municipality unless that person maintains a business office within that municipality."

Barnhart argued and the trial court agreed that the City could not require Barnhart to have a business license or impose a license tax upon him because the exemption from licensing under Section 71.620 applied to him. Barnhart argued that, despite physically operating out of an office within the City, he could not legally maintain a business office within the City. Barnhart asserted that the application of 4 CSR 250-8.010(1) ("no salesperson may be associated with a broker not maintaining a regularly established place of business"), and 4 CSR 250-4.050(2) ("a broker-salesperson or salesperson license shall be issued only to a person who is associated with a licensed broker") prevents a real estate salesperson from maintaining a business office within the City.

Acceptance of Barnhart's argument that, despite physically operating out of an office within the City he could not maintain a business office within the City, would make it legally impossible for any real estate salesperson to ever maintain a business office within any municipality, and therefore no municipality could ever require a real estate salesperson to obtain a business license. The trial court's ruling misinterpreting the interrelation between Sections 94.110 and 71.620, and

misapplication of 4 CSR 250-8.010(1) and 4 CSR 250-4.050(2), has the effect of holding that the City is expressly authorized to license real estate salespersons by Section 94.110 but is always prohibited from doing so by Section 71.620.

The trial court's ruling renders meaningless portions of Sections 94.110 (third class cities), 94.270 (fourth class cities), and 94.360 (special charter cities) from ever licensing real estate salespersons. This Court has rejected such an interpretation of statutes stating, "Construction of statutes should avoid unreasonable or absurd results. Furthermore, the legislature is not presumed to have intended a meaningless act." *Murray* at 233.

The trial court erred in applying unrelated portions of the Missouri Code of State Regulations pertaining to the professional conduct of real estate salespersons and brokers to Sections 71.620 and 94.110 governing cities' authority to license real estate agents or salespersons. In its application of these regulations to this situation the trial court held that these administrative regulations superceded the statutes. To the extent that the regulations were inconsistent with the statutes, the trial court should have disregarded the regulations. "When there is a direct conflict or inconsistency between a statute and a regulation, the statute which represents the true legislative intent must necessarily prevail." Parmley v. Missouri Dental Bd., 719 S.W.2d 745 (Mo. 1986).

CONCLUSION

The trial court erred when it entered its Judgment of Dismissal holding that as a matter of law the City could not require the Barnhart to have a business

license or impose a license tax upon him because the Barnhart does not and cannot maintain a business office in the City. The trial court's Judgment of Dismissal ignored the plain and ordinary meaning of Sections 94.110 and 71.620 R.S.Mo. 2000 and contradicted and conflicted with this Court's decision in *Anderson*. As a result, the Barnhart's Motion to Dismiss should have been denied. The decision of the trial court must therefore be reversed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 84.06 (b)

THIS IS TO CERTIFY that Appellant's Brief complies with the limitations in Rule 84.06 (b) and it contains 2,311 words.

Mark C. Piontek

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CITY OF WASHINGTON, MISSOURI,)

a municipal corporation,)

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DANIEL BARNHART,)

Respondent.)

Supreme Court No. SC84791

CERTIFICATE OF SERVICE

THIS IS TO CERTIFY that two (2) copies of the above and foregoing were mailed this ____ day of November, 2002, to Mr. Kurt A. Voss, Esq., Attorney for Respondent, First Bank Building, Suite 209, P.O. Box 2114, Washington, MO 63090.

Mark C. Piontek

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CERTIFICATE OF COMPLIANCE WITH RULE 84.06 (g)

Comes now Counsel for Appellant City of Washington, Missouri and hereby certifies that the disk filed in compliance with Rule 84.06 has been scanned for viruses and that it is virus-free.

Respectfully submitted,

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